INDEX

CITATIONS

Cases:

Cases (Continued) Page

Statutes:

Regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The order of the district court dismissing the government's complaint (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 28, 1969. By order entered on May 27, 1969, Mr. Justice Black extended

the time for filing this petition to and including July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether negligence attributable to the United States precludes it from obtaining indemnification from a negligent government contractor under a standard form contractual indemnity provision which makes the contractor "responsible for all damages to persons or property that occur as a result of his fault or negligence." [1]

REGULATORY PROVISIONS INVOLVED

Title 44 of the Code of Federal Regulations (1949 ed.), as amended to January 1, 1957 (1957 Cum. Supp.), provided in relevant part:

> Sec. 54.1 *Forms to be used.* Except as otherwise authorized, the following standard forms shall be used without deviation by all Executive agencies for or in connection with every formal contract of the kinds specified that may be entered into by them:
>
> * * * *
>
> (c) *Construction contracts.* (1) U.S. Standard Form No. 23-Rev., approved by the Sec-

[1] If certiorari is granted, we reserve the right to brief and argue the additional question whether, wholly aside from the effect of the contractual indemnity provision, the United States is entitled to recover in this case on a theory of breach of implied warranty, *i.e.*, the contractor's failure to perform its contract in a safe and workmanlike manner. See *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124.

retary of the Treasury, Revised April 3, 1942—for fixed-price contracts for the construction or repair of public buildings or works.

* * * *

Sec. 54.13 *Construction contract.*
U.S. Standard Form No. 23—Rev.

* * * *

ART. 10. *Permits and responsibility for work.* The contractor shall * * * be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work * * *.

The regulations presently in force are essentially milar. See 41 C.F.R. (1969 rev.) 1-16.401, 1-16.402, -16.404, 1-16.901-23A-Art. 12.

STATEMENT

This case arises out of a 1956 accident which inured one of respondent Seckinger Company's employees, one Branham, while he was working at the Parris Island Marine Depot in South Carolina under a contract between Seckinger and the government. Branham, a steamfitter, walked across the steam pipe he was installing to assist a fellow employee; in doing so, he came against a live, uninsulated electric wire carrying 2400 volts of electricity, and was burned and thrown to the ground by the resulting shock. Branham received Workmen's Compensation payments from the South Carolina authorities (R. 9, 13), and then sued the United States in the United States District Court for the Eastern District of South Carolina

under the Federal Torts Claims Act, 28 U.S.C. 2671 *et seq.*, claiming that it had been negligent in failing both to deenergize or insulate the wire near the work site and to warn the workers of the dangers involved.

The United States sought to implead the Seckinger Company as a third party defendant at that time, alleging that Branham's injuries were caused by Seckinger's negligence and seeking indemnification for any government liability under a contract clause providing that the contractor (Seckinger)

> shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work [R. 6, 12].

On Seckinger's motion, however, the trial judge dismissed the third-party complaint without prejudice, finding that the controversy it presented "should not be resolved at this time and further that its inclusion in the trial of [Branham's complaint] would unnecessarily and improperly complicate the issues [raised herein]" (R. 5). Thereafter, in the summer of 1961, the district court found the government to have been negligent and awarded Branham judgment for $45,000 and costs, which the government has paid.

In September, 1964, the United States instituted the present action against the Seckinger Company in the United States District Court for the Southern District of Georgia. The complaint was in two counts. The first count was based upon the contractual indemnity provision quoted above, alleging facts constituting proximately causal negligence on Seckinger's part: failure to request that the lines be deenergized or in-

sulated; failure to provide safety insulation; permitting, even directing, Branham to work near the live wires;[2] and failure to prevent him from proceeding in a dangerous manner. (R. 6). The second count alleged the same facts, adding that "having undertaken to perform the contract * * * the defendant * * * [was] obligated to perform the work properly and safely and to provide workmanlike service * * *" (R. 7), which it had failed to do. Seckinger moved to dismiss the complaint, and the district court did so. In its brief opinion, it reasoned (1) that the government should have appealed the dismissal of its third-party complaint in Branham's action, and was foreclosed from initiating independent proceedings against Seckinger; and (2) that the contract clause did not permit indemnification of the government for its own negligence and—government negligence having been found in Branham's action—such indemnification was necessarily sought in this suit.

On appeal, the United States Court of Appeals for the Fifth Circuit rejected the district court's first ground of decision, noting that in dismissing the third party complaint the trial judge had specifically invited the present suit. It agreed, however, with the district court's second ground of decision. The court reasoned that since the government had been found negligent in the prior action, any indemnification which it might obtain would necessarily be indemnification for its own negligence. Whether such indemnification would

---

[2] At the trial of Branham's action, he testified that his foreman, a Seckinger employee, had ordered him to make the crossing that led to his injury. (See pp. 34-38 of the transcript of that action, lodged herewith.)

be proper under a government contract was a matter of federal rather than state common law; as the federal rule, the court adopted the "majority rule" among the states—that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" to require such indemnification in the contract. Since it found no such statement in the contract, the court concluded that indemnification could not be required.

REASONS FOR GRANTING THE WRIT

The court of appeals has decided an important question of federal law—what contractual language is required to entitle the government to indemnity for the consequences of a contractor's negligence where the government's negligence has also contributed to the injury. In so doing, it adopted the "majority rule" among the states, that indemnification for an indemnitee's own negligence will be allowed only if there is an "unequivocal expression of intent" in the contract, and extended that rule to the case where both parties' negligence contributes to the injury. This question has not been, but should be settled by this Court. The decision below is erroneous and is in conflict with the federal law applicable to maritime contracts containing identical provisions.

The principle applied by the court below exposes the government to the possibility of extensive liability for damages not fully its fault. The contractual provision in issue, which the court found did not constitute an unequivocal expression of intent, required the contractor to assume responsibility for "*all* damages * * *

that occur *as a result of his* fault or negligence" (emphasis supplied). Such language has been required by federal regulation for all government fixed-price construction contracts at least since 1938. 41 C.F.R. (1938 ed.) 11.1, 11.3, 12.23 Art. 10; 41 C.F.R. (1943 Cum. Supp.) 11.4(c), 12.23 Art. 10; 41 C.F.R. (1949 ed.) 4.1(c), 4.13 Art. 10; 44 C.F.R. (1957 Cum. Supp.) 54.1(c), 54.13 Art. 10; 41 C.F.R. (1961 rev.) 1-16.401, 1-16.402, 1-16.404, 1-16.901-23A Art. 11; 41 C.F.R. (1969 rev.) 1-16.401, 1-16.402, 1-16.404, 1-16.901-23A Art. 12. See also Armed Services Procurement Regulation 7-602.13 (CCH 1968). While the regulations could be changed, any change would be entirely prospective, and could not affect the contracts already made under these regulations, as to which we are informed that there are over 200 government indemnity suits pending at the present time. The opinion below, if followed, will foreclose any recovery by the government in these cases, which involve a potential government recovery of some $30 million. It is thus apparent that the question is a recurring one, possessing substantial importance.

1. The court of appeals erred not only in adopting the "majority rule", but even more fundamentally in treating this case as one in which the government seeks indemnity from the contractor for its own negligence. Rather, the government's complaint seeks only to enforce the specific agreement in the contract that Seckinger should be responsible for all damages proximately caused by Seckinger's negligence. It is commonplace that there may be more than one proximate cause of injury, see, *e.g.*, *Porello* v. *United*

States, 153 F.2d 605, 607 (C.A. 2), remanded, 330 U.S. 446; here the complaint seeks indemnification only for the damage which Seckinger itself proximately caused.[3] Thus, this is not a situation like that in which the majority rule has most frequently been articulated, where an indemnitee seeks to hold an entirely non-negligent contractor responsible for the consequences of the indemnitee's own negligence. Where a contractor is faultless, "Courts are understandably reluctant to allow a negligent indemnitee to invoke general language [of indemnification] * * * to recover from a faultless indemnitor." *Associated Engineers, Inc.* v. *Job*, 370 F.2d 633, 651 (C.A. 8), certiorari denied, 389 U.S. 823.

Application of the rule even in the case of a faultless contractor has been soundly criticized by another panel of the court below in a diversity action governed by state law:

> [T]he majority rule rests on an unsound and dangerous foundation.
>
> It presumes, first of all, that one party's assumption of liability for losses due to another's negligence is an "unusual" and "hazardous" undertaking. We cannot agree. In the light of mod-

[3] The complaint having been dismissed, it must be assumed that the government can prove that Branham's injury did occur as a result of Seckinger's fault or negligence. The court of appeals' assertion that that injury was "caused primarily by the active direct negligence of the Government" and that the contractor was guilty at most of "some slight dereliction," *infra* at pp. 26-27, is unwarranted at this stage in the litigation. No such findings appear, or would have been appropriate, in connection with Branham's damage suit, since only the government was a party there.

ern conditions, we perceive little justification for so characterizing the indemnitor's obligation. Insurance companies assume this obligation every day, especially in connection with automobile liability policies. And, it is common knowledge that the device of insuring against one's own negligence through indemnity contracts is frequently employed in other business ventures.

Perhaps more important, even assuming that the burden imposed on the indemnitor is "unusual" or "hazardous", the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with the plain and clear meaning of the language employed by the contracting parties. This is a dangerous and unwarranted extension of the judicial function. * * * [W]here, as here, a contract does not violate public policy, we have no authority to achieve the same result by concluding that the parties did not really mean what the unambiguous language of their agreement imports.

Jacksonville Terminal Co. v. *Railway Express Agency, Inc.*, 296 F.2d 256, 262-263. The reasoning applies *a fortiori* here, where the contractor himself was among those responsible for the injuries in question without regard to the negligence of the government, the other party to the contract. Certainly there is nothing in the policy underlying the "majority rule" that justifies the determination of the court below to foreclose the government from seeking indemnification

no matter how negligent the contractor may have been or to what extent that negligence proximately caused the injuries complained of, so long as the government itself was also negligent in some degree.

We perceive no equivocation in the contractor responsibility clause. It plainly provides that the contractor shall be responsible for *all* damages *his* negligence causes (irrespective of any government contribution). Moreover, there are important reasons of policy for construing the clause to mean what it says. Contractors are generally covered by state workmen's compensation programs and hence insulated from direct negligence liability to their employees. Only if there is a third party, such as the government was in this case, will the employee have any chance to assert tort liability; then, any concurrent negligence on the third party's part will enable him to recover his entire damages from it, often in substantial amounts. Usually, however, as here, it is the contractor which is in direct control of the manner and conditions of work and thus is best situated to prescribe safe industrial practices. The third party's negligence may consist only in failing to provide a safe place to work or directly to transmit warning of dangerous conditions—failures which the contractor could and should have remedied. Compare *Associated Engineers, Inc., supra.* In such circumstances it is unfair to require the third party to bear the entire burden of tort liability just because it is the

only available defendant. The indemnity obligation not only redresses that imbalance, but also gives the contractor a necessary and desirable incentive to assure safe work methods and conditions for his employees.

The consequence of following the court's ruling would be to deprive the contractor responsibility clause of any substantial effect. The government is not subject to tort liability without fault on its part. *Dalehite* v. *United States*, 346 U.S. 15, 44-45; 28 U.S.C. 2671 *et seq.* Despite the court's contrary suggestion, *infra* p. 28, even a settlement or compromise of a claim by the government could be authorized only for injury "caused by the negligent or wrongful act or omission of a federal employee," 28 U.S.C. 2672; a case could not lawfully be settled to postpone resolution of the question of negligence to an action between the government and its indemnitor, if the responsible government officials believed the government's acts had not wrongfully contributed to the injury complained of. Thus the contractual provision could become operative as an indemnity clause only in situations where the United States had been adjudicated negligent or had in effect conceded its negligence through compromise or settlement. But the court of appeals ruled that a negligent contractor would not be required to indemnify the government for the consequences of its negligence if the government was also negligent. Since such negligence will always be present if the government is liable, the court's reading of the clause denies it all practical meaning. *Porello* v.

United States, supra, 153 F.2d at 609; *National Transit Co.* v. *Davis,* 6 F.2d 729, 730-733 (C.A. 3).

2. Both the "unequivocal expression of intent" requirement generally and the court's application of that rule to the provision involved in this case are in conflict with prior decisions of this court and the Second Circuit involving maritime contracts containing identical language.

In *Porello* v. *United States,* 153 F.2d 605 (C.A. 2), remanded 330 U.S. 446, applied on remand, 94 F. Supp. 952 (S.D.N.Y.), a stevedoring company had contracted to perform services for a government vessel, and undertook to be responsible "for any and all damage or injury to persons and cargo * * * through the negligence or fault of the Stevedore, his employees and servants." 330 U.S. at 457. One of the company's employees was injured through the concurrent negligence of the company and the government. He sued the government, which in turn claimed and obtained in the court of appeals full indemnification under the quoted provision. On petition for rehearing and in this Court, the stevedoring company argued for the "majority rule", claiming that the quoted language did not constitute an unequivocal expression of intent. 153 F.2d at 609; Brief for Petitioner, No. 69, O.T. 1946, 36-41. The court of appeals rejected that argument on the ground that, as "the United States could be liable only if itself at fault * * * [that] construction * * * would make the indemnity provision meaningless." 153 F.2d at 609. This Court passed over the argument and adopted instead the alternative suggestion of petitioner's brief, that the case be remanded

for a determination what the intention of the quoted language actually was. Brief for Petitioner, *supra*, at 41-42; 330 U.S. at 457. Obviously such a remand would have been pointless if the government's indemnification rights depended upon an *unequivocal* expression of intent; the Court necessarily determined that they did not. When, on remand, the stevedoring company refused to come forward with any evidence concerning the intent of the clause, the district court ruled that the court of appeals' interpretation therefore remained in effect. The Second Circuit has subsequently reaffirmed its holding in *Porello* that a clause so worded requires full indemnification. *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F.2d 227, 231.[4]

---

[4] The Fifth Circuit's decision is also in direct conflict with recent district court decisions. *United States* v. *Accrocco* (D.D.C., Civil Action 2853-65, decided March 21, 1969; *Fisher* v. *United States* (E.D. Pa., Civil Action No. 31345, decided April 23, 1969); but see *Troy S. Morris* v. *United States* (D. N. Mex., Civil No. 7136, decided December 13, 1968); *Percivill* v. *United States* (S.D. Tex., Civil No. 66-C-31, decided June 23, 1969). See also the following cases allowing indemnity under similar contractual indemnity provisions where both parties were negligent: *Associated Engineers, Inc.* v. *Job*, 370 F. 2d 633, 650 (C.A. 8), certiorari denied, 389 U.S. 823; *Jacksonville Terminal Co.* v. *Railway Express Agency, Inc.*, 296 F. 2d 256, 262-263 (C.A. 5), certiorari denied, 369 U.S. 860; *National Transit Co.* v. *Davis*, 6 F. 2d 729 (C.A. 3); *United States Steel Corp.* v. *Emerson-Comstock Co.*, 141 F. Supp. 143, 146 (N.D. Ill.); *Union Pac. R. Co.* v. *Ross Transfer Co.*, 64 Wash. 2d 486, 488, 392 P. 2d 450, 451; *Moses-Ecco Co.* v. *Roscoe-Ajax Corp.*, 320 F. 2d 685, 688 (C.A.D.C.); *Insurance Co. of North America* v. *Elgin, Joliet & Eastern Ry. Co.*, 229 F. 2d 705, 712 (C.A. 7); *Newberg Const. Co.* v. *Fischbach*, 46 Ill. App. 2d 238, 196 N.E. 2d 513.

The conflict between these holdings and the holding below is not blunted by the fact that they arose in a maritime context. There are no special maritime considerations—and none are suggested in the *Porello* opinion or briefs—to justify one rule for interpreting maritime contracts of indemnity and another rule applicable to federal contract cases generally. Indeed, the parties and this Court all agreed that the indemnity feature of the *Porello* contract had no special maritime nature. Brief for Petitioner pp. 48-52; Brief for the United States, pp. 45-50; 330 U.S. at 456.[5] There should be a single federal rule for interpretation of all indemnity obligations imposed by government contracts; the Fifth Circuit's opinion precludes such uniformity, and frustrates the government's justified reliance on the prior cases.

3. For the reasons stated, we believe the government's contract entitles it to *full* indemnity if it can prove the allegations of its complaint. The court below held it entitled to none. As this Court recognized in *Porello*, however, 330 U.S. at 458, there is a third possible meaning to the provision—that the government is to be indemnified on a comparative basis, to the extent a contractor's negligence contributed to a damage award. Since the government's non-liability in the absence of fault renders the clause meaningless if the view below is adopted, any ambiguity there may be involves the choice between full and partial indemnification. Accordingly, we urge in the alter-

---

[5] Admiralty jurisdiction was founded on the maritime nature of the underlying tort. *Ibid.*

native that an award of damages to the government on a comparative basis represents the minimum relief to which it is entitled under the indemnity provision. Such an interpretation would find support in several recent cases. *Brogdon* v. *Southern Railway Co.*, 384 F.2d 220 (C.A. 6); *Mayer* v. *Fairlawn Jewish Center*, 38 N.J. 549, 186 A.2d 274; *Williams* v. *Midland Constructors, et al.*, 221 F. Supp. 400, 403 (E.D. Ark.); *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 458, 256 S.W.2d 337, on remand, 227 Ark. 321, 299 S.W.2d 67. It would make possible at least a partial enforcement of the liability assumed by the contractor under the indemnity provision, while entirely avoiding any appearance that the contractor is being made to indemnify the government for the government's own fault.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
RONALD R. GLANCZ,
Attorneys.

JULY 1969.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23432

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY, APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

(February 28, 1969)

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

BROWN, Chief Judge: This case began sounding in tort but through a simple twistification, *General Guaranty Ins. Co.* v. *Parkerson*, 5 Cir., 1966, 369 F.2d 821 of the Federal impleader rule, F.R.Civ.P. 14 (a), plus a prior final judgment, it is now here after several dismissals for failure to state a claim, for a decision on the propriety of the most recent dismissal. We are called upon like many times in the past,[1] to

---

[1] American Agricultural Chemical Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856; Jacksonville Terminal Co. v. Railway Express Agency, 5 Cir., 1961, 296 F.2d 256; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, 294 F.2d 139; Batson-Cook Co. v. Industrial Steel Erectors, Inc., 5 Cir., 1958, 257 F.2d 410.

letermine if a contract[2] calls for indemnity or is nerely a simple responsibility clause. This case would ›e one of a simple nature except for two factors: first, n a prior suit, the indemnitee has been found negli-ent, and we must decide if this bars his recovery, and econd, another wrinkle, *Mike Hooks* v. *Pena*, 5 Cir., 1963, 313 F.2d 696, 1963 A.M.C. 355, is that the Jnited States is a primary party to the contract. We ire not here dealing with merely a contract entered nto between two private parties. Rather we are con-ronted with a contract having direct and significant ›ublic interest. Cf. *J. M. Huber Corp.* v. *Denman*, 5 Cir., 1966, 367 F.2d 104.

The facts can be severaly capsulated.[3] In 1956, Claimant, an employee of Contractor, was injured when he came into contact with a high voltage wire while working on a pipe job that Contractor was per-forming at the Paris Island Marine Depot, South Carolina. Claimant filed an FTCA suit, 28 U.S.C.A.

---

[2] *The contract in this case provides:*

"He [Seckinger] shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work."

[3] Claimant:

Ernest E. Branham, injured employee of Contractor who initiated the suit and recovered a judgment against the Government.

Contractor:

M. O. Seckinger Company, employer of Claimant and the appellee-indemnitor in this appeal.

Government:

United States Government, owner for whom work was being performed by Contractor and now the appellant-indemnitee.

Claimant is not a party to this appeal by the Government.

§ 1346(b) (1964), against the Government in South Carolina, for negligence in not deenergizing the wire and for not warning the workers of the danger involved. The Government filed a third-party claim[4] against Contractor alleging that Claimant's injuries were caused by Contractor's negligence, and asking for recovery against Contractor for all sums recovered by Claimant from it. Contractor, contending that the Government's third-party claim failed to state a claim upon which relief could be granted, moved to dismiss. The motion was granted.[5] Thereupon the suit by

---

[4] The Government brought this third-party claim against Contractor pursuant to F.R.Civ.P. 14(a) which provides:

> "*When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him."

[5] In granting the motion on July 17, 1961 the Judge's order stated:

> "After hearing the arguments of counsel, I am of the opinion that the controversy between the [Government] Third-Party Plaintiff, and [Contractor] Third-Party Defendant, should not be resolved at this time and further that its inclusion in the trial of the dispute between [Claimant] and [Government] would unnecessarily and improperly complicate the issues * * *. I therefore order that the * * * complaint of the United States be dismissed with leave * * * to the United States * * * to take such further action at an appropriate time * * *."

Not because we have inherited an appeal which otherwise would have gone to the Fourth Circuit, we think subsequent events prove that nothing was to be gained by truncating the case. Since all claims were for determination by the Judge without a jury under FTCA, the complications, if any, were readily controllable. There are many ways to handle varying

Claimant against the Government went to trial in the District Court in South Carolina. The Government was found negligent and Claimant awarded $45,000.

Thereafter the Government instituted the present suit against Contractor in the Southern District of Georgia asserting that Contractor's negligence caused Claimant's injuries, and that under the express terms of the contract between the parties (see note 2, *supra*), Contractor was required to indemnify the Government. Contractor's motion to dismiss this complaint was granted. The Court had a double-barrelled basis for its dismissal. The first was that this suit was barred by res judicata since the Government had not appealed from the prior dismissal of its impleader claim. The second was that a mere examination of the contract showed that it is not one which would allow the Government, who had been found negligent in a prior trial, to recover its losses from Contractor. This appeal followed.

The prior dismissal of the Government's claim (see note 5, *supra*) was without prejudice to refiling. We hold that dismissal on the ground of res judicata was erroneous since the Trial Court expressly left it open for the Government to pursue its claim at a later date.

The question at the outset is what law is to govern, State (South Carolina) or Federal? We think the simple answer is that Federal law must control.[6] The

---

issues, burdens of proof, etc., in impleader, cross-claim situations. See United States Lines Co. v. Williams, 5 Cir., 1966, 365 F.2d 332, 336 n. 11, 1966 A.M.C. 2418, 2424 n. 11.

[6] 41 Am.Jur.2d *Indemnity* § 5 at 691 (1968).

> "Federal case law is controlling as to the right of the Federal Government to indemnification under an indemnity contract into which it has entered, and such a contract is not repugnant to the Federal Tort Claims Act or contrary to public policy."

first and certainly one of the leading cases in this area is *Clearfield Trust Co.* v. *United States*, 1943, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838. There the Court held that "[t]he application of state law * * * would subject the rights and duties of the United States to exceptional uncertainty." 318 U.S. at 367, 63 S.Ct. at ——, 87 L.Ed. at ——. There is obviously a need for uniformity in results relative to claims presented by the United States to the Federal Courts for solution.[7] As the discussion on the ultimate merits reveals, there is more than enough difficulty in trying to synthesize a rule that could safely be followed by a multi-state corporate business enterprise in determining the construction and enforceability of indemnity contracts without imposing the same uncertainty and burden on the national sovereign in its undertaking to have contractors perform essential work within its wide sphere of governmental responsibilities. Anything having such a direct touch upon the national treasury should likewise be resolved on standards having like national uniformity. But to conclude that it is Federal law, not State (South Carolina) law, that governs, is no solution. It merely states the problem for there is no clearly defined Federal law, which means that with divergent views in the 50 states, we must make the choice.

At the outset the Government seeks to escape from the necessity of any choice and certainly the prospect of our adopting, as a Federal rule, the majority rule.

---

[7] *Cf.* Petty v. Tennessee-Missouri Bridge Comm'n, 1959, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804; United States v. Jones, 9 Cir., 1949, 176 F.2d 278. *See* Free v. Bland, 1962, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180; Royal Indemnity Co. v. United States, 1941, 313 U.S. 289, 61 S.Ct. 995, 85 L.Ed. 1361; Security Life & Accident Ins. Co. v. United States, 5 Cir., 1966, 357 F.2d 145.

It does this by asserting that its agreement with Contractor is not one for indemnity at all, whether indemnity based upon the Government's negligence as indemnitee or the indemnitor-Contractor's negligence, or a mixture of both. It insists that the engagement is a simple but direct one of putting responsibility on Contractor for all damages to property or persons, although its manner of statement and the absence of the classic terminology of indemnity might well have a bearing upon how it is to be construed and applied. We think this is a much too literal, unrealistic approach. If the Government is right on the construction of it, then in its operative effect it will afford to the Government all of the advantages of an indemnity and will impose on Contractor all of the correlative disadvantages. Thus the stage is set for a determination of the significance negligence on the part of the indemnitee should have. For a while this case suffers from all of the uncertainties of a swift and unilluminating disposition on bare bones pleadings.[8]

The very assertion of the case by the Government inevitably casts it in the role of a negligent actor. The Government's claim against Contractor rests on the

---

[8] As we recently said in Barber v. M/V Blue Cat, 5 Cir., 1967, 372 F.2d 626, "at this day and time dismissal of a claim —landbased, waterborne, amphibious, equitable, legal, maritime, or an ambiguous, amphibious, mixture of them all—on the basis of the barebone pleadings is a precarious one with a high mortality rate." *Id.* at 627. The test for a dismissal without a fact finding, articulated in Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, is "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46, 78 S.Ct. at 102, 2 L.Ed.2d at ——. This brings us to the asserted facts of the claim and the terms of the contract.

fact that it has had to pay substantial sums to Claimant and this was the direct result of a finding of negligence on its part. Its allegation that Contractor was negligent and that this negligence of the Contractor, not that of the Government, was the real proximate cause of Claimant's injuries does not save the day. It simply precipitates the problem of whether this contract (see note 2, *supra*) imposes on Contractor the burden of absorbing all of the loss brought about by active negligence of the indemnitee if, in some appreciable way, negligence even though slight, of the indemnitor contributed to the damage.

That question is essentially one of contract construction, but a construction viewed from the standpoint of the parties, their relative freedom of action and real bargaining strength and the principles of construction imposed by the pertinent law (State or Federal) concerning the liberality or strictness with which such agreements are to be read. For we would certainly not consider for a moment in fashioning Federal law, that a contract to indemnify one against the consequences of the indemnitee's own negligence is contrary to public policy and thus void altogether, even though there is some division among the courts.[9]

In approaching this as a question of law, really choice of law, governing Federal contracts and con-

---

[9] Some jurisdictions hold such a contract void ab initio as against public policy. Woodbury v. Post, 19—, 158 Mass. 140, 33 N.E. 86; Sternman v. Metropolitan Life Ins. Co., 19—, 170 N.Y. 13, 62 N.E. 763. Other courts hold that such contracts are not void, cf. National Surety Corp. v. Rauscher, Pierce Co., 5 Cir., 1966, 369 F.2d 572, 577.41 Am.Jur.2d *Indemnity* § 9, at 694 (1968): "[I]t is now the prevailing rule that a contract may validly provide for the indemnification of one against, or relieve him from liability for, his own future acts of negligence provided the indemnity against such negligence is made unequivocally clear in the contract."

tractual relationships with governmental contractors, we think everything points toward the desirability of seeking not only a uniformity for the national sovereign but doing that in a way which will more or less simultaneously effect a uniformity with local law. The easiest way to achieve that is to declare that the Federal interest will best be served by choosing the majority rule. Of course, to choose the law is not to eliminate uncertainty or difficulty or the possibility of variable results. But it will lay a standard concerning the approach which the reviewing court is to have and those principles which the court may properly regard to be the performance of acceptable judicial functions and prerogatives.

The majority rule has been variously stated. 41 Am. Jur. 2d § 15, at 701 (1968): "[A]n overwhelming majority of jurisdictions adhere to the general rule requiring an unequivocal expression of intent before allowing indemnity for the indemnitee's own negligence * * *."

Although this court in *Jacksonville Terminal*[10] re-

---

[10] Jacksonville Terminal Co. v. Railway Express Agency, Inc., 5 Cir., 1962, 296 F.2d 256, *cert. denied*, 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed.2d 18. However, *Jacksonville* which spoke for Florida only now apparently is but an historical marker for it now joins the many other cases where the highest state courts within the Fifth Circuit have declined to follow our *Erie* judgments. W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1967, 388 F.2d 257, 264-65 n. 11-14, *reversed*, 1968, —— U.S. ——, 88 S.Ct. ——, 20 L.Ed.2d 835.

In Gulf Oil Corp. v. Atlantic Coast Line R.R., Fla. Dist. Ct. App., 1967, 196 So. 2d 456, *cert. denied*, Fla., 1967, 201 So. 2d 893, the Florida District Court of Appeal expressly declined to follow *Jacksonville* stating that there were strong indications since *Jacksonville* that Florida Courts would adopt the majority rule. After analyzing *Jacksonville*, the Florida cases, and rejecting it and the idea that a clause reading essentially the same as that in *Jacksonville* was adequate, the

jected the "majority rule" for Florida because it "rests on an unsound and dangerous foundation" 296 F.2d 256, 262, and because "the majority rule presumes that courts have the power to alleviate or eliminate this burden by construing the indemnity agreement in a manner which is patently inconsistent with

---

Gulf Court concluded: "It is evident, then, that Florida decisions hold that an indemnity agreement which indemnifies against the indemnitee's own negligence must state this in 'clear and unequivocal' language."

"* * * there must be language *specifically* designating indemnification against one's own negligence." 196 So. 2d at 459. (Emphasis in original).

This authoritative choice by a Florida Court of Appeal bears the stamp of approval evidenced by the denial of certiorari by the Florida Supreme Court. Unlike the equivocal counterpart in the Federal system, denial of certiorari stands for much in Florida. As we said in Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 5 Cir., 1966, 364 F.2d 957, 965-66, n. 7, quoting Hunter v. Tyner, Fla., 1942, 10 So. 2d 492: "A writ of [certiorari] being simply a method of procedure by which such appeals authorized by the statute can be brought to this Court, its denial, we think, was an adjudication of the propriety of the order involved and it could not again be questioned in this appeal."

We went on, quoting Advertects, Inc. v. Sawyer Indus., Fla., 1953, 64 So. 2d 300: "The order appointing the receiver was reviewed by this Court on a petition for writ of certiorari and this Court affirmed the order of the chancellor by denying the petition for writ of certiorari." 364 F.2d at 966.

We are not unmindful of a later Florida Appellate decision purporting to adopt the minority rule, Thomas Awning & Tent Co. v. Toby's Twelfth Cafeteria, Inc., Fla. Dist. Ct. App., 1967, 204 So. 2d 756, where one Judge dissented on the basis of *Gulf, supra.* However, by direct communication with the Clerk of the Florida Supreme Court we are advised that certiorari was not applied for in that case. It is therefore our *Erie* judgment that the majority rule adopted for Florida in *Gulf, supra,* stands as the latest authoritative pronouncement of Florida Law.

the plain and clear meaning of the language employed by the contracting parties" and thus constitutes "a dangerous and unwarranted extension of the judicial function" 296 F.2d 256, 262, it recognized that the so-called majority rule had been fairly stated in *Batson-Cook*.[11] We described the process of contract construction in *Batson-Cook* this way, "[I]n this process, it is the law which steps in and tells the parties that while it need not be done in any particular language or form, unless the intention is unequivocally expressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence. The question then is: does the specific contract in dispute clearly reflect such a purpose?" 257 F.2d at 412.[12]

---

[11] Batson-Cook Co. v. Industrial Steel Erectors, 5 Cir., 1958, 257 F.2d 410. American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856 (concurring opinion). This was, of course, an *Erie* declaration for Alabama which may have been superseded by the Alabama Supreme Court in Republic Steel Corp. v. Payne, Ala., 1961, 132 So.2d 581, 586.

[12] In footnote 3 of *Batson-Cook* we were at pains to list the number of cases from this Court echoing this accepted principle and finding now an agreement which did cover the indemnitee's negligence and others holding to the contrary, depending upon the wording, setting, and other guides toward divination of the so-called intent of the parties.

We undertook also, to make quite plain that the contract need not contain the talismanic words "even though caused, occasioned, or contributed to by the negligence, sole or concurrent of the indemnitee," or like expressions. 257 F.2d at 412.

Although the District of Columbia Circuit accepts the majority rule's requirement that the intention to indemnify against the indemnitee's negligence must clearly appear, Moses-Ecco Co. v. Roscoe-Ajax Corp., D.C. Cir., 1963, 320 F.2d 685, 687 citing *Batson-Cook*, at 688 n.2 it properly declined to follow it if it was read to require the presence of the talismanic words.

Of course, to state the rule which is a guide to the court's approach hardly determines the case. Indeed, the travail just begins. Except where the words are identical, little is to be gained by comparing this case with that, or matching this phraseology against another. Indeed, the same words frequently receive contradictory constructions at the hands of the highest appellate courts separated only by the imaginary boundary line of contiguous states. The "intention" of the parties is frequently more the statement of a result than a statement of a reason why. So much is wrapped up in the policy considerations which this or that jurisdiction considers within the proper scope of the judicial function or of critical relevance. See *American Ag. Chem. Co.* v. *Tampa Armature Works*, *supra* (concurring opinion). Added to this is the fact that for every similarity there is a dissimilarity. It begins and ends then as a matter of the law, that is, through the judicial function, construing the contract. That depends on that contract.

When we zero in on this particular contract (see note 2, *supra*) from the standpoint of the position of the parties at the time the contract was made,[13] we find no sign pointing unequivocally to a purpose on the part of a small subcontractor performing some integral part of a Government contract to take upon its shoulders the unlimited obligation either in terms of dollars or events precipitating damage to others when caused primarily by the active direct negligence of the

---

[13] When dealing with the construction of a contract, the court must place itself in the place of the parties and determine their mutual intent. J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; American Oil Co. v. Hart, 5 Cir., 1966, 356 F.2d 657; American Ag. Chem. Co. v. Tampa Armature Works, Inc., 5 Cir., 1963, 315 F.2d 856. *Cf.* Indemnity Ins. Co. v. DuPont, 5 Cir., 1961, 292 F.2d 569; Fidelity-Phenix Fire Ins. Co. v. Farm Air Service, Inc., 5 Cir., 1958, 255 F.2d 658.

Government simply because in the judicial scales some slight dereliction of the Contractor occurred which, among joint tort feasors the law would recognize. The very nature of the National Government argues against any but the largest of industrial enterprises as Governmental contractors, rationally undertaking such far-flung burdens. There is first the very size, the immensity, of Government. This is complicated more frequently as a matter of necessity, by security considerations which close to the private contractor any access to information, sometimes of the most rudimentary kind, by which a contractor could ascertain whether it was reasonably safe to rely upon the expectation that the Government would do its part to minimize risks in today's complex, frequently hazardous, Governmental contract operations. Of course, this is not to make the contract in terms here employed superfluous at all. The Contractor bears full responsibility for damage occasioned by his negligence alone or his negligence in connection with other contractors or subcontractors [14] or members of the public, excluding only the Government as indemnitee.[15] It also supplies a procedural device to assure effective legal recourse by the negligence-free Government against the negligent Contractor.[16] The argument sometimes

---

[14] Cf. Travelers Ins. Co. v. Busy Elec. Co., 5 Cir., 1961, 294 F.2d 139; Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431.

[15] 41 Am.Jur.2d *Indemnity* § 16, at 703 (1968):

> "Where the injury was caused by the concurrent negligence of the indemnitor and the indemnitee, the courts have frequently read into contracts of indemnity exceptions for injuries caused in part by the indemnitee, although there is authority to the contrary."

[16] See, e.g., American Ag. Chem. Co. v. Tampa Armature Works, 5 Cir., 1963, 315 F.2d 856, 861 n.3 (concurring opinion).

made, that contracts of this kind must be read to include the indemnitee's negligence, for otherwise there would be no occasion to demand hold-harmless indemnity, is extremely superficial. With stakes so high today, parties frequently pay out substantial, huge sums of money in settlement, frequently with the acquiescence and approval of the indemnitor, reserving questions vis-a-vis themselves for later determination. See, e.g., *James F. O'Neil Co.* v. *United States Fidelity & Guaranty Co.*, 5 Cir., 1967, 381 F.2d 783.

For these reasons the Government fails on its contract construction theory. But the Government, as do all other parties today, when everything else fails, falls back on the Tinker-to-Evers-to-Chance multiple impleaders in the *Sieracki-Ryan-Yaka* situations of indemnity based upon breach of the WWLP—the breach of the warranty or workmanlike performance.[17] So far this court has kept this newly formed concept strictly confined to salt water or at least amphibious applications.[18]

---

[17] D/S Ove Skou v. Hebert, 5 Cir., 1966, 365 F.2d 341, 1966 A.M.C. 2223; United States Lines v. Williams, 5 Cir., 1966, 365 F.2d 332, 1966 A.M.C. 2418.

[18] See Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436.

The United States urges for the resolution of this case the adoption of the implied-indemnity theory of Ryan Stevedoring Co. v. Pan-Atlantic Steamship Co., 1956, 350 U.S. 124, 78 S.Ct. 232, 100 L.Ed. 133, which allowed indemnity to the shipowner from the stevedore because the stevedore "breached his duty to do the job safely" and his failure to do so gives rise to a cause of action in implied indemnity. This principle of law is indeed Federal in nature, but it is not the appropriate one for the resolution of this case. This Court in Halliburton v. Norton Drilling Co., 5 Cir., 1962, 302 F.2d 431, 436, declined to apply Ryan. In fact, this Court held in Koninklyke v. Strachan Shipping Co., 5 Cir., 1962, 301 F.2d 741, that "the ex-

The Government has been found guilty of active negligence proximately causing substantial injuries to the Claimant. Contractor, even though guilty of some concurring negligence, has no obligation under this contract to indemnify the Government against the consequences of the Government's neglect.

AFFIRMED.

---

press indemnity agreement may have waived any possible implied one." In Centraal Strikstof Verkoopkanter v. Walsh Stevedoring Co., 5 Cir., 1967, 380 F.2d 523, this Court held that "[t]he implied warranty established in Ryan is a product of the admiralty courts and a creature of the admiralty law * * *. The cases in which the doctrine has been applied have been admiralty cases which presented substantially similar circumstances to those existing in *Ryan*." Id. at 529.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1966

No. 23432

D. C. Docket No. 1647—Civil Action

UNITED STATES OF AMERICA, APPELLANT

versus

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY
APPELLEE

Appeal from the United States District Court
for the Southern District of Georgia

Before BROWN, Chief Judge, GOLDBERG and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay

the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 28, 1969

Issued as Mandate: March 26, 1969.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

Civil Action No. 1647

UNITED STATES OF AMERICA

vs.

M. O. SECKINGER, JR. t/a M. O. SECKINGER COMPANY

ORDER OF COURT

Defendant having filed a Motion to Dismiss plaintiff's claim of indemnity on several grounds, the indemnification clause of the contract must be reviewed.

> "He (defendant) shall be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work." (Page 3—Contract between plaintiff and defendant) (Parenthesis added)

Previously, the plaintiff had been adjudged negligent under a similar set of facts by the United States District Court, Eastern District, South Carolina. (AC-183) Under Order of that court it has paid to one Branham the sum of Forty-five Thousand ($45,000.00) Dollars because of its negligence on the job which plaintiff worked as a subcontractor.

The plaintiff now seeks recovery of this amount from the defendant based on the indemnification as aforestated.

It seems that plaintiff cannot succeed for several reasons.

First, in AC-183 the government attempted to involve the defendant by impleading him as a third party defendant. The court entered an Order stating

that the controversy between the United States and Seckinger should not be resolved at that time and dismissed the plaintiff's third party complaint.

The plaintiff having thus failed to implead the defendant is now seeking to do the same thing. It does not seem that they have this right. Certainly, an appeal should have been filed on the previous Order of Judge Timmerman if the plaintiff intended to prosecute their claim against Seckinger.

Moreover, the court finds that the language of the contract as alleged is not broad enough either expressly or impliedly to indemnify the government from its own negligence. Certainly, this court is bound by the fact that the government was negligent and adjudged so. As a result, the instant claim seeks indemnification from the plaintiff's own negligence. Plaintiff was in an ideal position to write more into its contract if it actually intended indemnification from its own negligence. Such a broad save harmless agreement is commonplace but none appears in the contract under consideration.

Other arguments are advanced by defendant. He strenuously maintains that he has paid his obligation for any injury to Branham, his employee, by way of compliance with the Workmens Compensation law. He also maintains there can be no contribution between joint tort feasors. He also maintains that plaintiff is attempting to go behind the South Carolina judgment in order to maintain its position. While these arguments appear meritorious, sufficient grounds to sustain the Motion have already been stated.

For all the foregoing reasons, the Motion to Dismiss of defendant is hereby granted.

This 11 day of October, 1965.

/s/ F. M. Scarlett
Judge, United States District Court
Southern District of Georgia

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

Civil Action File No. 1647

UNITED STATES OF AMERICA, PLAINTIFF

vs.

M. O. SECKINGER, JR., t/a M. O. SECKINGER COMPANY,
DEFENDANT

This action came on for (hearing) before the Court, Honorable F. M. Scarlett, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged in accordance with Order filed October 12, 1965, that this action be dismissed.

Dated at Savannah, Georgia, this 3rd day of November 3rd, 1965.

EUGENE F. EDWARDS,
Clerk
U. S. District Court,
S. D. Georgia

By: /s/ Louis E. Aenchbacher
LOUIS E. AENCHBACHER
Chief Dep. Clerk of Court

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 357756 43